Nos. 04-1411, 05-1027, 05-2039, S144753

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

FASHION VALLEY MALL, LLC,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NOTICE OF INTENT TO RELY ON U.S. COURT OF APPEALS BRIEF

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NOTICE OF INTENT TO RELY ON U.S. COURT OF APPEALS BRIEF

NOTICE IS HEREBY GIVEN that Petitioner in the above-entitled matter does intend to rely on the opening brief filed in the United States Court of Appeals for the District of Columbia, and filed herewith are an original and 13 copies of Petitioner's Opening brief with the United States Court of Appeals for the District of Columbia, on or about July 22, 2005.

DATED: September 28, 2006

Law Offices of W. McLin Lines
3838 Carson Street, Suite 102
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By _____
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Attorneys for Petitioner,
Fashion Valley Mall, LLC.

CERTIFICATE OF SERVICE

Supreme Court of California
Nos. S144753, 04-1411, 05-1027, 05-2039

----------)
FASHION VALLEY MALL, LLC,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.
----------)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 3838 Carson Street, Suite 102, Torrance, California 90503.

On this date, I served the document described as **NOTICE OF INTENT TO RELY ON U.S. COURT OF APPEALS BRIEF (TOGETHER WITH [CORRECTED] BRIEF FOR PETITIONER FASHION VALLEY MALL, LLC — FILED ON OR ABOUT JULY 22, 2005)** on all interested parties in this action:

X By placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

SEE SERVICE LIST ATTACHED HERETO

X (By Mail) I caused said envelopes to be deposited in the U.S. Mail, as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, at Torrance, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after that date of deposit for mailing in this affidavit.

X I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Torrance, California on September 28, 2006

Carolyn Regan

Carolyn Regan

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-1411, 05-1027, 05-2039

FASHION VALLEY MALL, LLC,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

On Application for Review of an Order
of the National Labor Relations Board

[CORRECTED][1] BRIEF FOR PETITIONER FASHION VALLEY MALL, LLC

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[1] The only correction made to Petitioner's Opening Brief filed June 20, 2005 included herein is the designation in the Table of Authorities of the principal authorities relied on by Petitioner.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

1. Parties before the National Labor Relations Board

The respondent employer in the proceedings before the National Labor Relations Board was Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a/Fashion Valley Shopping Center, and the charging Party union was Graphic Communications International Union, Local 432M, AFL-CIO. The General Counsel of the National Labor Relations Board was also a party during the proceedings before the National Labor Relations Board.

2. Parties before this Court

The Petitioner in this case is Fashion Valley Mall, LLC, successor in interest to Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a/Fashion Valley Shopping Center. The Respondent in this case is the National Labor Relations Board.

3. Disclosure Statement

Petitioner Fashion Valley Mall, LLC, is a Delaware limited liability company, and is the current owner of the Fashion Valley Mall and the successor in interest to The Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center. Fashion Valley Mall, LLC is owned by Fashion Valley MM, LLC, a Delaware limited liability company. Fashion Valley MM, LLC is owned by Simon Property Group,

L.P., a Delaware limited partnership, and AXA Equitable Life Insurance (formerly The Equitable Life Assurance Society of the United States), a New York corporation. The general partner of Simon Property Group, L.P. is Simon Property Group, Inc., which is publicly traded on the New York Stock Exchange. AXA Equitable Life Insurance is owned by AXA Financial Services, LLC, a Delaware limited liability company. AXA Financial Services, LLC is owned by AXA Financial, Inc., a Delaware corporation. AXA Financial, Inc. is owned by AXA, a French company that is publicly traded on the New York Stock Exchange.

B. Ruling Under Review

Petitioner seeks review of the decision and order of the National Labor Relations Board entered the 29th day of October, 2004 in NLRB Case No. 21-CA-33004, reported at 343 NLRB No. 57, printed in the Joint Appendix at 495-507 (tab 35).

C. Related Cases

The case under review was not previously before this Court or any other court. No other related cases are currently pending in this Court or any other court of which counsel is aware.

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STATUTES

I.

STATEMENT OF JURISDICTION

The Board properly asserted jurisdiction over the Union's unfair labor practice charge pursuant to Section 10(a) of the National Labor Relations Act ("Act"), 29 U.S.C. § 160(a). This Court has jurisdiction over Fashion Valley's petition for review of the Board's Order pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), and has jurisdiction over the Board's cross-application for enforcement pursuant to Section 10(a) of the Act, 29 U.S.C. § 160(a).

II.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does a privately owned shopping center, under the California constitution, have a significant interest in shielding its stores and merchants from requests or demands that customers not purchase merchandise and services from one or more stores or merchants in the shopping center?

2. Is a rule that, without regard to the content of the reason or purpose for the consumer boycott, prohibits using consumer boycotts to interfere with the business of one or more of the stores or merchants in a privately owned shopping center in California an unconstitutional content based regulation of expressive activities under the California Constitution?

3. Are the Board's findings that the Union's "Dear Customer" handbill requested a consumer boycott of Robinson-May, and that the Union was therefore not required to apply for a permit to take access to Fashion Valley's property to distribute the handbill, supported by substantial evidence in the record considered as a whole?

III.

STATEMENT OF THE CASE

Petitioner Fashion Valley Mall, LLC is the successor in interest to the Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center ("Equitable Life"), which owned Fashion Valley Mall during the period of time relevant to this case. Fashion Valley Mall is a large shopping mall in San Diego, California. *Joint Appendix ("J.A.") at 176 (tab 3).* Because of its size and popularity, Fashion Valley Mall is required by California law to allow persons wishing to engage in expressive activities at the Mall to take access to the Mall in order to do so. However, California law also permits Fashion Valley to regulate such access through a application-permit process. Accordingly, at all times material to this case Fashion Valley management has required all individuals and organizations wanting to engage in expressive activities at Fashion Valley Mall, including the

distribution of handbills, to apply for and receive a permit as required by Fashion Valley's regulations prior to doing so. *J.A. at 175, ¶ ¶ 12-13 (tab 2).*

On October 4, 1998 approximately 20 supporters of Graphic Communications International Union, Local 432M, AFL-CIO (the "Union"), which was then engaged in a labor dispute with the San Diego Union Tribune newspaper ("Union Tribune"), took access to the Fashion Valley Mall and began distributing handbills publicizing the Union's dispute with the Union Tribune. The demonstrators were asked by Fashion Valley management to discontinue their hand billing activity until they had applied for and received a permit pursuant to Fashion Valley's regulations. The Union's supporters discontinued their hand billing and left the property. *J.A. 495-496 (tab 35).*

On October 14, 1998 the Union filed an unfair labor practice charge alleging that Fashion Valley violated Section 8(a)(1) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1), by refusing to permit employees of the Union Tribune to engage in the Union's October 4 hand billing activity. *J.A. at 189 (tab 5).* On September 30, 1999 the General Counsel for the Board ("General Counsel") issued a complaint alleging that Fashion Valley had violated Section 8(a)(1) of the Act by, among other conduct, maintaining a rule (Rule 5.6.2) that prohibited persons engaging in expressive activity at Fashion Valley Mall from attempting to discourage the purchase of merchandise or services from any

business operating at the Mall, and by seeking to enforce that prohibition against the Union. *J.A. at 190-194 (tab 6).*

The complaint's allegations were tried before Administrative Law Judge William L. Schmidt ("ALJ") on October 10, 2000. *J.A. at 1 (tab 1).* On September 26, 2001 the ALJ issued a decision finding that Fashion Valley's application-permit rules bared activity expressly permitted by California law and that it would have been futile for the Union to apply for a permit to take access to the Mall for the purpose of engaging in its handbilling activity. The ALJ concluded that Fashion Valley "failed to meet its burden of establishing that it had a right under California law to exclude the Union leafleters from its property on October 4" and that Fashion Valley therefore "violated Section 8(a)(1) by prohibiting access to the Union's leafleters under a threat of civil and criminal trespass action." *J.A. at 363-364 (tab 26).*

Thereafter, both Fashion Valley and General Counsel filed exceptions to the ALJ's decision. *J.A. at 368-374 (tab 28); J.A. at 438-439 (tab 31).* On October 29, 2004 the Board issued its Decision and Order ("Board Order"), reported at 343 N.L.R.B. No. 57, that is the subject of Fashion Valley's petition for review before this Court. *J.A. at 495-507 (tab 35).* The Board found that Fashion Valley's Rule 5.6.2 was "not a time, place, and manner restriction permitted under California law." *J.A. at 496 (tab 35).* The Board concluded that Fashion Valley

therefore violated Section 8(a)(1) of the Act by maintaining Rule 5.6.2 and by excluding the Union's handbillers on October 4, 1998 because they would have been required to agree to abide by "an unlawful rule" in order to receive a permit to distribute the Union's handbill. *Id.*

On December 6, 2004 Fashion Valley filed its petition for review of the Board's Order. On or about January 26, 2005 the Board filed an application and cross-application for enforcement of its Order.

IV.

STATEMENT OF FACTS

A. Fashion Valley's Rules

As noted, Petitioner Fashion Valley Mall, LLC is the successor in interest to Equitable Life, which owned Fashion Valley Mall during the period of time relevant to the Board's Decision. Equitable Life leased space at Fashion Valley Mall to tenants engaged in retail sales to the public. Equitable Life also retained a management company, Jones, Lang, LaSalle, Americas, Inc. ("LaSalle") to manage and operate Fashion Valley Mall on its behalf. *J.A. at 174, ¶ ¶ 1-4 (tab 2).*

Fashion Valley has time, place and manner regulations ("Fashion Valley's Rules") in place for all individuals and organizations that wish to engage in expressive activity at Fashion Valley. Since the Rules were established, Fashion Valley management has required all individuals and organizations wanting to

engage in expressive activities at Fashion Valley, including the distribution of handbills, to apply for and receive a permit as required by the Rules prior to doing so. *J.A. at 175, ¶ ¶ 12-13 (tab 2).*

Fashion Valley's Rules have been modified from time to time in accordance with the development of California law relating to public access to private shopping centers such as Fashion Valley. W. McLin Lines, who has practiced commercial real estate law in California for over 20 years and who is an expert on access issues relating to shopping centers in California, initially drafted and has since been responsible for modifications to Fashion Valley's Rules. *J.A. at 91-93 (tab 1); J.A. at 177-188 (tab 4).* Fashion Valley's initial Rules were drafted in response to the California supreme court's decision in *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979) ("*Pruneyard*"). In *Pruneyard*, the California supreme court reinstated its prior decision in *Diamond v. Bland,* 3 Cal. 3d 653 (1970) ("*Diamond I*"), and held that individuals wishing to engage in expressive activities on the private property of large shopping centers could not be absolutely prohibited from doing so. At the same time, the California supreme court held that a shopping center had the right to establish "reasonable" regulations to "assure" that such activities did not interfere with normal business opportunities. *Id.* at 910-911. However, the court did not lay down any specific guidelines for

determining what would be considered a "reasonable" regulation. *J.A. at 93-94 (tab 1).*

In 1987, *H-CHH Associates v. Citizens for Representative Government,* 193 Cal. App. 3d 1193 (*"H-CHH Associates"),* was issued by the California court of appeal. *H-CHH Associates* provided a considerable amount of detail relating to permissible regulation of public access by a shopping center so as to assure that the expressive activities would not interfere with normal business operations. As a result of the *H-CHH Associates* decision, Fashion Valley's Rules were reviewed and revised by Lines. In revising Fashion Valley's Rules, Lines was not only guided by the *H-CHH Associates* case, but also by input received from the attorney for an applicant who wished to engage in expressive activities. *J.A. at 93-97 (tab 1).*

In 1997, another case was issued by the California court of appeal that was considered by Lines in relationship to Fashion Valley's Rules. In *Union of Needletrades, etc. Employees v. Superior Court,* 56 Cal. App. 4th 996 (1997) (*"UNITE"*), the California court of appeal considered the application-permit process of a shopping mall in relationship to labor-related expressive activity. The court affirmed the validity of the shopping center's rules, including the requirement that a labor organization wishing to engage in labor-related expressive activity apply for and receive a permit prior to doing so. Lines saw no reason to

modify Fashion Valley's Rules following the *UNITE* decision; in fact, *UNITE* provided additional support for Fashion Valley's Rules inasmuch as the regulations for three of the defendant shopping centers in *UNITE* were also represented by Lines and had substantially identical rules as those in place at Fashion Valley. *J.A. at 98-103 (tab 1).* Thus, Fashion Valley's Rules in existence in October 1998 were based on the guidelines laid down by the California courts in *Pruneyard*, *Diamond I*, *H-CHH Associates* and *UNITE*.

In Part 1 of Fashion Valley's Rules, "Applicant" is defined as the person, group, or organization requesting a permit; "expressive activity" is defined as written or verbal communication; and "Participant" is defined as the person actually engaging in the expressive activity. *J.A. at 179 (tab 4).* Part 2 generally requires that the Applicant submit an application for and obtain a permit before engaging in expressive activity and that any person who takes access without a permit shall be considered to be committing a trespass. *J.A. at 179-180 (tab 4).* Part 3 provides that the Applicant and each Participant must agree to abide by the Rules when engaged in an expressive activity. *J.A. at 180 (tab 4).*

Part 5 sets forth conduct which is prohibited by Participants in an expressive activity. Part 5 prohibited, in part and as directly relevant to the issues before this Court, expressive conduct advocating boycott activity directed at the Mall's merchants:

5.6 **[Conduct] [i]mpeding, competing or interfering with the business of one or more of the stores or merchants in the shopping center by:**

* * *

5.6.2 Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center.

J.A. at 183-184 (tab 4)

B. The Union's October 1998 Handbilling Activity At Fashion Valley.

The Union has represented the pressmen employed at the San Diego Union Tribune newspaper for many years. At all times during September and October 1998 the Union was involved in a primary labor dispute with the Union Tribune. *J.A. at 175, ¶ 11 (tab 2); J.A. at 23-26 (tab 1).*

In or around early September 1998, the Union decided to conduct handbilling activity at the Robinsons-May store located at Fashion Valley. The Union chose this particular Robinsons-May location primarily because of its popularity with the shopping public, and secondarily because it is located only one-half mile from the Union Tribune's premises and advertises in the Union Tribune. On October 3, 1998 Union president Jack Finnerman telephoned Fashion Valley's security office and advised security guard Douglas Lee that Union members would conduct a protest outside the Robinsons-May store at approximately 1:00 p.m. the following day. Lee advised Finnerman of Fashion Valley's Rules requiring that a permit be obtained in order to engage in such activity at Fashion Valley.

Finnerman replied that the Union had a constitutional right to engage in the demonstration, and the Union made no attempt to apply for a permit to engage in the planned handbilling activity. *J.A. at 24-29, 38-39, 62-63, 163-64, 166 (tab 1); J.A. at 243 (tab 18).*

On October 4, 1998 the Union conducted its planned demonstration. Approximately five to seven individuals, including children, were deployed at each of the entrances to the Robinsons-May store, where they distributed handbills to members of the public as they were passing by the area or entering and leaving the store. The handbill read:

The News You Will NEVER read in The San Diego UNION-TRIBUNE

Dear customer of Robinsons-May,

- **The Union-Tribune threatens to discontinue our pension;**
- **Pressroom workers are forced to pay excessive health insurance costs, ten times higher than other employees;**
- **The Union-Tribune has been found guilty of numerous Labor Board charges;**
- **Pressroom workers have had no pay raise in nearly seven years.**

To the employees of Robinsons-May,

Our dispute is with The San Diego Union-Tribune.

We are not asking you to cease working for your employer.

How You Can Help

If you feel that employers should treat employees fairly,

Call Gene Bell, CEO at the Union Tribune, 293-1101.

The Union-Tribune makes record profits each year and they should be willing to share a small portion of them with the people who actually do their labor to put out the paper.

Robinsons-May advertises with the Union-Tribune.

J.A. at 29-36, 64-66, 154-156 (tab 1); J.A. at 207 (tab 11) (italics and bold original).

Approximately 15 minutes after the handbilling activity began, Eugene Kemp, Jr., General Manager of Fashion Valley, approached Marty Keegan, the Union representative leading the demonstration. Kemp advised Keegan that the handbillers were on private property and that they needed to complete an application to receive a permit if they wished to engage in expressive activity at Fashion Valley. Kemp also told Keegan that if the demonstrators did not leave, they would be subject to civil litigation and/or arrest. He also provided Keegan with the standard notice that is to be given to any individual(s) engaging in expressive activity at Fashion Valley without the appropriate permit. The notice stated in relevant part:

C. The Union Refuses To Apply For A Permit

On October 14, 1998 the Union filed an unfair labor practice charge alleging that Fashion Valley had violated Section 8(a)(1) of the Act by refusing to permit employees of the Union Tribune to leaflet in front of the Robinsons-May. In response, Fashion Valley, by its counsel Lines, advised Richard D. Prochazka, counsel for the Union, that the Union would be permitted to engaged in expressive activity at Fashion Valley upon submission of a completed application for a permit and subsequent cooperation with Fashion Valley to plan and complete an expressive activity in accordance with the Rules. The Union ignored Fashion Valley's invitation. In October 1999, Fashion Valley again invited the Union to work with Fashion Valley in applying for a permit and then planning an expressive activity to take place at Fashion Valley, and advised the Union that the Rules did not then prohibit a participant in expressive activity at Fashion Valley from urging a boycott of any of the tenants at Fashion Valley.[1] Again the Union ignored Fashion Valley's invitation. The Union has not attempted to engage in any expressive activity at Fashion Valley since its October 4, 1998 handbilling. *J.A. at 110-114 (tab 1); J.A. at 208-211 (tab 12); J.A. at 254-259 (tabs 21-22).*

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[1] Rule 5.6.2 was deleted from Fashion Valley's Rules effective September 1, 1999 "subject to appropriate revision and restatement." *J.A. at 238 (tab 15).*

D. Proceedings Before the Board

During the proceedings before the Board's ALJ, General Counsel's primary theory was that Fashion Valley did not have the right under California law to acquire labor protestors to comply with Fashion Valley's application permit process under any circumstances. *See, i.e., J.A. at 328-335 (tab 25).* Based on the Board's intervening decision in *Glendale Assocs.*, 335 N.L.R.B. 27 (2001), the ALJ rejected this theory. *J.A. at 358-359.* Nevertheless, the ALJ agreed with General Counsel that California law provides enhanced protection to labor-related speech in comparison to all other types of expressive activity, and also determined that *Pruneyard, H-CHH Associates* and *UNITE* were inapplicable because they did not properly apply California "labor law" as expressed in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25 Cal.3d 317 (1979). *J.A. at 358-360.* Having placed labor-related speech on a different, higher level than non-labor-related speech, the ALJ then concluded that Rule 5.6.2's prohibition of consumer boycott activity could not be applied to a labor union under California law. *J.A. at 361-363.*

Both Fashion Valley and the General Counsel filed exceptions to the ALJ's decision. *J.A. at 368-374 (tab 28); J.A. at 438-439 (tab 31).* While those exceptions were pending before the Board, this Court issued its decision in *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004). In *Waremart*, this

Court found that California law does not, and cannot, differentiate between labor-related speech and other types of speech because such a distinction constitutes content discrimination in violation of the First Amendment. *Id.* at 874-875. *Waremart* held that "under California law labor organizing activities may be conducted on private property only to the extent that California permits other expressive activity to be conducted on private property." *Id.* at 875. Accordingly, this Court in *Waremart* refused to enforce the Board's conclusion in that case that California law permitted union organizers to distribute literature on a stand-alone grocery store's private property.

On October 29, 2004 the Board issued its Order in this case. In order to avoid application of the *Waremart* decision,[2] the Board limited its Order to finding that Rule 5.6.2 was a "content-based restriction and not a time, place, and manner restriction permitted under California law," and that by maintaining that rule and requiring the Union to agree to abide by it in order to receive a permit to engage in expressive activities at the Mall, Fashion Valley violated Section 8(a)(1) of the Act. The Board's Order holds:

> California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. *Robins v. Pruneyard Shopping Center*,

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[2] See *J.A. at 496 (n.5) (tab 35).*

> 23 Cal.3d 899 (1979) . . . *Glendale, supra*, 335 NLRB at 28. Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. That is, the rule prohibits speech "urging or encouraging in any manner" customers to boycott one of the shopping center stores. By contrast, there is no evidence in the record explaining how Rule 5.6.2 regulates the time, place, or manner of speech at the Mall. Rather, it appears that the purpose and effect of this rule was to shield the Respondent's tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find that the Respondent violated Section 8(a)(1) by maintaining Rule 5.6.2.

J.A. at 496.

V.

SUMMARY OF ARGUMENT

California law allows a shopping center to adopt and enforce regulations protecting the shopping center's merchants from disruption of their business by persons who are allowed to take access to the shopping center to engage in expressive activities. Fashion Valley's Rule 5.6.2 is a regulation that prohibits individuals taking access to the Mall from encouraging customers not to purchase merchandise or services offered by the shopping center's merchants once they are on Fashion Valley's private property. Rule 5.6.2 is permissible under California law because the regulation protects the significant and primary interest of the shopping center and its tenants in promoting the sale of merchandise and services to the shopping public.

Additionally, Fashion Valley is a nonpublic forum as defined by California law. Fashion Valley therefore has the right to prohibit speech that interferes with the intended purpose of the Mall so long as it does not discriminate on the basis of the speaker's viewpoint when doing so. Rule 5.6.2 does not discriminate on the basis of the speaker's viewpoint. Rule 5.6.2 is also therefore a "content-neutral" restriction under California law because it applies to any and all requests for a consumer boycott of the Mall's merchants or the merchandise or services they offer for sale, regardless of the subject matter or viewpoint of the speaker advocating the boycott, and without prohibiting discussion and debate of the speaker's views.

The Board's Order did not analyze Rule 5.6.2 under applicable California law, and its conclusion that Rule 5.6.2 is an impermissible "content-based restriction" is contrary to California law. Finally, the Board's finding that the Union's "Dear Customer" handbill requested a consumer boycott, and that the Union would therefore not have been allowed access to distribute the handbill had it applied for a permit to do so, is not supported by substantial evidence.

VI.

ARGUMENT

A. Fashion Valley Has A Right Under California Law To Prohibit Access That Interferes With The Primary Purposes Of A Shopping Mall

The Board's Order fails to discuss, much less apply, California law establishing that a shopping center is entitled to promulgate and enforce rules that protect its merchants from interference in their normal business operations. The standard of review for the Board's interpretation and application of California law is *de novo*. *SSA v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000) (standard of review of an agency's interpretation of general law not committed to that agency's administrative mandate is *de novo*).

Decisions by the California courts have long recognized that a shopping center has the right to prohibit expressive activities that will result in undue interference with the shopping center's normal business operations. For example, in *Diamond I*, 3 Cal.3d 653 (1970), the California supreme court held that operators of shopping centers do not have the right under California law to absolutely prohibit all First Amendment activities on the premises of the shopping center. *Id.* at 665. At the same time, *Diamond I* recognized that shopping centers must be permitted to adopt and enforce "reasonable regulations calculated to protect their business interests." *Id.* *Diamond I* also recognized that a shopping center had the right to engage in regulation that might otherwise be considered an

unlawful "prior restraint" in order to ensure that its business operations would not be disrupted by individuals engaging in expressive activity on the property of the shopping center, holding that "regulations, if not repressive in scope, can be devised to protect [the shopping center] from actual or **potential** danger of First Amendment activities being conducted on its premises in a manner **calculated to disrupt normal business operations** and to interfere with the convenience of customers." *Id.* at 665 (emphasis added). The *Diamond I* court held that access must be permitted for expressive activities "**unless there is obstruction of or undue interference with normal business operations.**" *Id.* at 666 (emphasis added). Similarly, in *Pruneyard*, 23 Cal.3d 899 (1979), the California supreme court again recognized that a shopping center had the right under California law to adopt regulations to "assure" that expressive activities conducted on the shopping center's property "do not interfere with normal business operations (see *Diamond [I]* at p. 655)." *Id.* at 911.

The substantial interests of a shopping center to prohibit access that interferes with the shopping center's normal business activities under California law is perhaps best expressed in *H-CHH Associates*, 193 Cal.App.3d 1193 (1987). As stated in *H-CHH Associates*, *Pruneyard* "recognized in the owner [of a shopping center] important rights of substance; those rights are identified as freedom from disruption of normal business operations and freedom from

interference with customer convenience." *Id.* at 1208. Indeed, the degree to which California law permits shopping centers to prohibit uses that would interfere with the ability of the merchants in the center to makes sales to the shopping public is most graphically demonstrated by the approval in *H-CHH Associates* of an absolute ban on any solicitation because solicitation has the potential to divert funds that would otherwise be spent at the stores in the center:

> ... the solicitation of political funds is entirely incompatible with the normal character and function of the Plaza. The Plaza exists as a center of commerce; **its function is to facilitate the ease of commerce and to promote the business of its merchant tenants. Any activity seeking to solicit political contributions necessarily interferes with that function by competing with the merchant tenants for the funds of Plaza patrons**. Since solicitation does interfere with the basic function of the Plaza, plaintiffs are entirely within their rights in prohibiting such activity.

Id., 193 Cal.App.3d at 1221 (emphasis added). As stated in summary fashion by the California court of appeal in *UNITE*, "a privately owned center . . . has a substantial interest in ensuring that its as well as its tenants' normal business operations are not interrupted." *UNITE*, 56 Cal.App.4th at 1015, n. 7. .

The *H-CHH Associates* and *UNITE* interpretation of *Pruneyard* logically apply the little said in that decision about how a shopping center might "assure" that expressive activities did not interfere with "normal business operations." *Pruneyard* recognized that shopping centers were in the business of selling

merchandise and services. *Pruneyard* observed that a shopping center invites the public "to visit for the purpose of patronizing the many businesses." *Pruneyard*, 23 Cal.3d at 902. *Pruneyard* cited several facts and opinions justifying the extension of the constitutional protection of speech to privately owned shopping centers. One of those factors was the increase in retail sales by suburban shopping centers and the corresponding decrease in retail sales in the central business district. Another factor was the opinion that the largest segment of the population, the suburban population, was likely to spend "the most significant amount" of its time in suburban shopping centers purchasing the goods and serves that it wanted and needed. Id., 23 Cal.3d at 907.

The *H-CHH Associates* and *UNITE* interpretation of *Pruneyard* simply applies to shopping centers rules articulated by the California and U.S. Supreme Courts. In *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352 (2000) ("*Alliance for Survival*"), the California supreme court held that constitutionally protected conduct could be regulated to prevent interference with the purpose for which the owner had dedicated the property. Quoting from its earlier decision in *People v. Fogelson*, 21 Cal.3d 158 (1978), *Alliance for Survival* noted that "**[t]he state may ... reasonably and narrowly regulate solicitations in order ... to prevent ... interference with the business operations being conducted on the property.**" *Alliance for Survival*, 22 Cal.4th at 364 (emphasis

in original). *Alliance for Survival* also noted that *Fogelson* had relied on the rule previously articulated in *In re Hoffman*, 67 Cal.2d 845, 852 (1967), where the California supreme court had held that "[h]ad petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave." *Hoffman* elaborated as follows: (1) "the test is ... whether petitioners' use of the station ... interfered with ... the functioning of the station as a transportation terminal ...", and (2) the petitioners' activities could have been prohibited if they had "distract[ed] or interfere[d] the railroad employees' conduct of their business." *Id.*, 67 Cal.2d at 851.

The Board's failure to analyze California constitutional law resulted in the Board failing to consider Fashion Valley's substantial interest under California law to prohibit expressive activities that interfere with the primary purpose of the Mall, namely the sale of merchandise to the shopping public, resulting in an order by the Board that is contrary to California law. The Board's failure to consider Fashion Valley's substantial interest in this regard also resulted in the erroneous finding that Rule 5.6.2 was an impermissible content-based regulation under California law, as will now be explained.

B. California Law Permits Fashion Valley To Prohibit Access To Individuals Wishing To Encourage Customers Not To Purchase Merchandise Or Services Offered By The Merchants At The Mall

Rule 5.6.2 prohibits any Applicant or Participant wishing to engage in expressive activities at Fashion Valley from "urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center." *J.A. at 184 (tab 4).* The Board found that this rule was "a content-based restriction and not a time, place, and manner restriction permitted under California law." *J.A. at 496 (tab 35).* However, the Board offered no explanation of how it arrived at this conclusion, and cited no California law to support it. Had the Board actually taken the time to analyze California law in this area, it presumably would have decided differently. The standard of review for the Board's determinations on issues of California law is *de novo*. *SSA v. FLRA*, 201 F.3d at 471.

With due respect to how the NLRB would prefer to see labor unions take advantage of the unique public access to privately owned shopping centers permitted by California constitutional law, California constitutional law does not prevent Fashion Valley from prohibiting requests that the shopping center's customers boycott one or more stores in the shopping center. The review of a prohibition of boycott requests requires a clear understand of what a "boycott" is. In the relevant context, a "boycott" is a means of coercing a change in a protested

product, condition, policy, practice, etc., with a concerted refusal to do business with the targeted store.[3] In the relevant context, a "boycott" is what the protestor asks the shopping center's customer to do as a means of forcing a third party to do what the protestor wants done. And, what the protestor is asking the customer to do (actually not to do) is inherently inconsistent with the dedicated purpose of the shopping center — the promotion of sales of merchandise and services in the shopping center.

1. California Law Allows Fashion Valley To Prohibit Speech That Interferes With The Primary Purpose Of The Mall.

The Board contends that the Union need not comply with Fashion Valley's regulation prohibiting access for expressive activities that encourage customers not to purchase goods or services sold by a store in the Fashion Valley shopping center. However, prohibition of specific types of speech that interfere with the

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[3] What is a boycott?

The American Heritage® Dictionary of the English Language, Fourth Edition © 2000 by Houghton Mifflin Company defines the verb "boycott: as "[t]o ... act together in abstaining from ... buying ... as an expression of protest or disfavor or as a means of coercion."

Merriam-Webster Dictionary of Law, © 1996 Merriam-Webster, Inc., defines the verb "boycott" as "[to] engage in a concerted refusal to have dealings with (as a store, business, or organization) usually to express disapproval or to force acceptance of certain conditions," and defines the noun "boycott," in the context of labor disputes, as "an organized effort of a labor union and its members to discourage consumers from buying the products of a particular employer."

primary purposes for which the shopping center exists, namely the sale of merchandise to the shopping public, is permissible under California law.

No California supreme court or court of appeal decision has even implied that a privately owned shopping center must permit access to individuals who have the express intent to interfere with the sale of goods or services by the merchants in the center, or are required to endure even the risk of such harm. In fact, the cases suggest just the opposite. The approval in *In re Hoffman*, 67 Cal.2d 845, of a prohibition against *any* interference with the conduct of business on the property is particularly significant — "had [the] petitioners in **any way interfered** with the conduct of the railroad business, they could legitimately have been asked to leave." *Id.* at 852 (emphasis added). *Diamond I* also sanctioned the use of a prohibition against "activities being conducted ... in a manner calculated to disrupt normal business operations." *Id.*, 3 Cal.3d at 665. Similarly, *Pruneyard* sanctioned the use of regulations to "assure" that the use of the shopping center as a public forum did "not interfere with normal business operations." *Id.*, 23 Cal.3d at 911.

H-CHH Associates' approval of an absolute ban on any solicitation graphically demonstrates California law allowing shopping centers to prohibit uses that would interfere with normal business operations. *H-CHH Associates* approved the prohibition against solicitation because a shopping center was not a "public forum," and solicitation was "entirely incompatible with the normal character and

function of the ... [shopping center] to facilitate the ease of commerce and to promote the business of its merchant tenants." *Id.*, 193 Cal.App.3d at 1211. As noted in the quote from *H-CHH Associates* set out in Section A above, the court held that solicitation could be prohibited in the shopping center because solicitation competed with the shopping center's merchants for the dollars in the shopping public's pocket. If California law allows the shopping center to prevent a single person from asking for a single dollar which, if given to the solicitor, might have been used to purchase goods or services somewhere in the shopping center, then a shopping center can certainly prevent one or more persons from asking customers not to purchase any goods of services from a store in the shopping center. The potential adverse impact on the promotion of a single business in the shopping center due to the request for a single dollar which may never have been spent in that or any other store in the shopping center is far less than the potential impact on a targeted store of a request not to purchase *anything* from that store.

2. Fashion Valley Is A "Nonpublic Forum" And Therefore May Prohibit Speech That Interferes With The Primary Purpose Of the Mall.

Fashion Valley, relying on the "forum analysis" articulated in *Clark v. Burleigh*, 4 Cal.4th 474 (1992), argued before the Board that a privately owned shopping center should be put in the "nonpublic forum" category, and that the owner of property which was a "nonpublic forum" could prohibit speech that

interfered with the primary purpose of the property. *J.A. at 301-310 (tab 24)*. The Board's Regional Director, the General Counsel, and the ALJ, relied on an interpretation of California law that avoided the necessity of having to address this and other principles of California constitutional law. In a nutshell, the AJL found that Fashion Valley's rules "barred activity expressly permitted by California law" (*J.A. at 363 (tab 26)*) and concluded that Fashion Valley's "contention that California law does not distinguish between concerted labor activities and expressive activities protected by the California Constitution is just badly mistaken" (*J.A. at 360 (tab 26)*). The AJL based his conclusions, and his criticism of Fashion Valley's interpretation of California constitutional law, on his opinion that a trilogy of California "labor law" cases stated the operative principles of California law — "Specifically, I find Respondent's limitations on the type of activity ... in conflict with applicable state law... Section 5.6.2 of Respondent's rules barred consumer boycott activity despite the clear, unmistakable and longstanding holdings in *Sears, Lane*, and *Schwartz-Torrance* permitting exactly this kind of activity." *J.A. at 361 (tab 26)*.

This Court held in *Waremart Foods v. NLRB*, 354 F.3d 870, issued while the ALJ's opinion in this case was pending before the Board, that the Board erred when in relied on *Sears* to provide greater protection to labor-related speech than to other types of speech. This Court's decision in *Waremart Foods* should have

forced the Board to apply California constitutional law to the regulation of labor speech on privately owned shopping centers. The Board, however, concluded that a prohibition of boycott request was an unconstitutional regulation of speech without applying the "forum analysis" articulated in *Clark*, or explaining why a "forum analysis" was not required. For the reasons discussed below, the Board's (erroneous) conclusion that a prohibition of boycott requests was "content-based" does not avoid the necessity of applying "forum analysis" articulated in *Clark*.

The California constitutional principle of forum analysis articulated in *Clark* is simply stated — the property owner can prohibit public access to a nonpublic forum that would interfere with the intended use of the property. Thus, the Board's contention that Fashion Valley cannot in any manner regulate the content of expressive activities on the Fashion Valley shopping center is contrary to California law because the contention ignores the fact that "[n]othing in the [California] Constitution requires the owner of property to which constitutional protections apply freely to grant access to all who wish to exercise their right to free speech without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Clark v. Burleigh*, 4 Cal.4th at 482.

Fashion Valley concedes that the California constitution protects the public discussion of labor issues, among others, on the Fashion Valley shopping center. However, the common areas of the Fashion Valley shopping center must be placed

in a forum category because the extent to which the property owner can control use of the property as a forum for expressive activity depends on the nature of the forum category of the property. *Clark v. Burleigh*, 4 Cal.4th at 482.

As is established in *Clark* and the federal authorities cited therein, there are three forum categories into which the property can be placed:

1. Traditional public forum: Public streets and parks.

2. Designated public forum: "[P]roperty that the state has opened for expressive activity by part or all of the public." Courts and commentators have also referred to this category as a "limited public forum," or as a "public forum by designation."

3. Nonpublic forum: All other public forums fall into this category. "[A] 'nonpublic forum' is simply public property that is not a public forum by tradition or design." This term is misleading. "Property in this category is not 'nonpublic' in the sense that it is privately owned; it remains at all times public property either owned or controlled by the government. Nor is the property a "forum" in the sense of a meeting place or medium for open discussion ...." Given the property which has been identified as a traditional public forum and the absence of examples of designated public forums, a succinct description of a nonpublic forum would be any public property other than streets and parks. *Id.* at 482-484.

In other words, the further property lies from a "traditional public forum," the greater the property owner's control over access to the property and "the lower the standard of review" (*H-CHH Associates*, 193 Cal.App.3d at 1224):

1. Traditional public forum: The regulation of "the content of speech" is subject to "strict scrutiny." "[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Clark v. Burleigh*, 4 Cal.4th at 483. To enforce a "content-based prohibition," the public agency must show that prohibition "is necessary to serve a compelling state interest" and that the prohibition "is narrowly drawn to achieve that end." *H-CHH Associates*, 193 Cal.App.3d at 1224. In contrast to the higher standard of review for content-based regulation, the standard for review of "content-neutral" time, place, and manner regulations is that they must be "narrowly tailored to serve a significant [as opposed to a compelling] government interest, and leave ample alternative channels of communication open." *Id.*

2. Designated public forum: "A content-based regulation of speech in a designated public forum is subject to strict scrutiny: 'Regulation of such property is subject to the same limitations as that governing a traditional public forum.'" *Clark v. Burleigh*, 4 Cal.4th at 483.

3. Nonpublic forum: The regulation of expressive activity "must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *H-CHH Associates*, 193 Cal.App.3rd at 1224 (quoting *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, at 44 (1983).

A privately owned shopping center is most like a nonpublic forum, and if the shopping center were publicly owned it would be a nonpublic forum. And, it would appear that the standard for review of regulations adopted by a privately owned shopping center is even lower than that applied to regulations of public property which is a nonpublic forum.[4]

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[4] By definition, a privately owned shopping center cannot be placed in any one of the forum categories applicable to public property. "For two reasons, a *Pruneyard*-type forum [the use of a privately owned shopping center as a public forum] falls into none of the three *Perry* categories. First, it is privately owned. Second, the limitations on the public's access to the property originate not from any governmental or other public entity, but from the private owner." *H-CCH* at 1224-1225 (footnote omitted). While the quoted text is from the concurring and dissenting opinion, the principles expressed are consistent with the California

When applying California's "public forum doctrine" to a challenged regulation involving a nonpublic forum, the court does not decide whether the regulation restricts the content of speech in that forum or only its time, place, or manner. Rather, the court decides whether the regulation is reasonable and does not suppress an expressive activity merely because of a disagreement with the speaker's views. The owner of a nonpublic forum can "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view .... Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity .... Specifically, a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum .... These distinctions may be impermissible in a [traditional] public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Clark v. Burleigh*, 4 Cal.4th at 484, 491.

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supreme court's discussion and application of the same principle of constitutional law in *Clark v. Burleigh*.

The question, therefore, is not whether the prohibition imposed by Rule 5.6.2 would restrict what is said, or just restrict the time, place, and manner of what is said. The question is whether the conduct described in Rule 5.6.2 is incompatible with the intended use of the Fashion Valley shopping center as a center of commerce promoting the business of the stores in the shopping center. If so, it is a valid regulation under California law.

In this regard, Fashion Valley has sought to prevent, without regard to the view expressed, any conduct which would interfere with a store in the shopping center by urging, or encouraging customers not to purchase the merchandise or services sold by a store in the shopping center. The test under California law is not whether this prohibition was the most reasonable, or the only reasonable restriction on public access to the shopping center. Under California law, the regulation will be sustained if it is a reasonable restriction on incompatible activities — "In contrast to a [traditional] public forum, a finding of strict incompatibility between the nature of the speech ... and the functioning of the nonpublic forum is not mandated." *Clark v. Burleigh*, 4 Cal.4th at 494.

Rule 5.6.2 shares substantial similarities with the prohibition against attacking an opponent in the candidate's statement that was challenged in *Clark v. Burleigh*. The restriction challenged in *Clark* limited the candidate's statement to the candidate's own background and qualifications, and prohibited references to

any other candidates. The California supreme court upheld the constitutionality of this content-based restriction on one of the most protected, if not the most protected, category of speech, political speech, because it was a reasonable, view-point neutral, restriction on the use of a nonpublic forum that sought to protect the intended purpose of the candidate's statement. *Id.*

In this regard, Fashion Valley wishes to underscore the obvious fact that Rule 5.6.2 is narrowly tailored to prohibit conduct that is disruptive of the primary purpose of the Mall; as explained, public access can be denied to a nonpublic forum where it "may disrupt the property's intended function." *Id.* at 492. The California constitution "does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Id.*

The prohibition described in Rule 5.6.2 is a viewpoint-neutral regulation of public access and speech. It does not represent or reflect an effort to suppress expression because of any disagreement with the motivation or cause for the speaker's intent to interfere with the targeted store's business. The owner of property which is a nonpublic forum may draw distinctions which reasonably relate to intended uses of the property, and the only "distinction drawn" by Rule 5.6.2 relates to protecting the property against inherently disruptive conduct, or at least conduct with an inherently disruptive objective. *Id.* at 494. Since the

challenged regulation prohibits any conduct, it necessarily operates evenhandedly. *Id.*

Rule 5.6.2 does not leave the Union, or any other person wishing to express their dissatisfaction with an individual, institution, or entity, without adequate alternate channels of communicating their message. The challenged regulation does not affect the Union's ability to use the sidewalks around the shopping center, mail letters, etc., to customers in the shopping center's market area, attract media attention, maintain internet websites, or utilize any other forum for encouraging people not to patronize a store in the shopping center. This is significant because the Union is not entitled to unrestricted access to a nonpublic forum because the use of that forum would be the most effective means of delivering its message. *Id.* at 494.

The Board cannot avoid the consequences of the appropriate measurement of the Union's California constitutional right to use the Fashion Valley shopping center as a public forum by placing the shopping center in the traditional public forum category. *Pruneyard* does not provide much, if any, express guidance on the management of the consequences of its mandate that privately owned shopping centers allow access to those wishing to engage in expressive activities. *Pruneyard*, for sure, does not expressly place the mandated access area the shopping center must provide into one of the three forum categories discussed

above. This omission is at least in part due to the fact that U.S. and California supreme courts did not clarify the public forum doctrine until after the *Pruneyard* opinion was written. At least the leading cases — *Perry Ed Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense & Educ. Fund* 473 U.S. 788, 799-800 (1985) — cited by *Clark v. Burleigh*, and the dissent in *H-CHH Associates*, post-date *Pruneyard*.

This silence, however, does not mean that *Pruneyard* offers no guidance to what is the proper standard for reviewing the constitutionality of a privately owned shopping center's regulation of the forum it is required to provide. *Pruneyard's* heavy reliance on the standards articulated in *In re Hoffman*, 67 Cal.2d 845, for regulating expressive activities in what would later be defined as a nonpublic forum points only in the direction of categorizing a shopping center as a nonpublic forum. In discussing the right of a government agency to regulate the use of what would later be a classical example of a nonpublic forum, *Hoffman* held that, had the "petitioners **in any way** interfered with the conduct of the ... [railroad station's] business, they could legitimately have been asked to leave." *Id.* at 852 (emphasis added). This is because the owner of a "nonpublic forum" has an interest "in assuring the efficient and orderly use of ... [the facility] for ... [its] primary purposes." *Id.* at 849. Such a facility may protect its "primary use" with "ordinances that **prohibit activities that interfere with those uses.**" *Id.* at 850

(emphasis added). Further reinforcing the owner of the public facility's power to exclude any manner or form of interference, *Hoffman* held that "**[a]ny appreciable interference** with the orderly carrying on of [the public facility's] business may suffice." *Id.* at 852 (emphasis added).

Nothing in the parameters for the appropriate regulation of expressive activities set by *Hoffman* even suggest any concern about the evils or "content-based" regulation in this context or the existence of any exception for pure speech which inherently interferes with the use of the public facility. Rather, *Hoffman* sanctioned the power to prohibit expressive activity that caused "any appreciable interference" with the business of the public facility without regard to the "way" in which the expressive activity caused such interference. The question is whether the expressive activity interfered with the intended uses of the facility, not the way in which the expressive activity would interfere. If the constitutionally permissible objective is to preserve the non-forum uses of the property, then it does not matter whether the interference with the non-forum uses of the property is the result of what is said, or the way in which it is said. Approaching this point from the reverse direction, if a person does not have a constitutionally protected right to interfere with the non-forum uses of the property, then why should a person have a constitutionally protected right to ask others to interfere with the non-forum uses of

the property? The inescapable conclusion is that it is the fact, not the method, of interference which is relevant.

H-CHH Associates, albeit without saying so in so many words, placed or associated a privately owned shopping center in or with the nonpublic forum category — the "quasi-public" forum described in *H-CHH Associates* is the "nonpublic forum" described in *Clark*, etc.:

> [D]espite plaintiffs' characterization to the contrary, *Robins* did not establish a new standard of reasonableness to be applied to private property. *Robins* relied heavily on *Diamond I* ... and *In re Hoffman* ... each of which addressed the use of privately owned property as a "quasi-public" forum. *Hoffman* is particularly instructive on the issue of what type of restriction is reasonable. The court first specifies that protected activity which is free from interference [by the property owner]: that which does not interfere with the conduct of business or the use of the property ...

H-CHH Associates, 193 Cal.App.3d at 1208. Thus, *H-CHH Associates* effectively placed shopping centers in a private property equivalent of a "nonpublic forum" by approving a shopping center's prohibition against solicitation because a shopping center was not a "public forum," and solicitation was "entirely incompatible with the normal character and function of" a shopping center. *H-CHH Associates*, 193 Cal.App.3d at 1220-1221. And as shown, a "content-based" regulation to protect the intended purpose of the property is consistent with the permissible restrictions on a "nonpublic forum."

Moreover, this categorization of a shopping center is consistent with the description of a "nonpublic forum" adopted by *Clark v. Burleigh.* "The government does not create a ... public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." The question is whether the public agency "intended to designate a place not traditionally open to assembly and debate as a public forum." *Clark v. Burleigh,* 4 Cal.4th at 485, quoting from *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. at 802. This is why the public terminals of three major airports in the New York metropolitan area were "nonpublic forums," even though substantial portions were open to the general public and dedicated to commercial activities "such as restaurants, snack stands, bars, newsstands, and stores of various types." *Clark v. Burleigh*, 4 Cal.4th at 488.

Neither *Hoffman*nor *Pruneyard* addressed the extent to which the property owner could restrict intentionally disruptive messages because none of the parties involved in those cases intended to interfere with any business on the property to which access was sought. Given the absence of any intent to disrupt a business on the property, the only possible interference with the intended use of the property would have been by the method [time, place, and manner] of communicating the message. The absence of any discussion in these cases of the right to restrict intentionally disruptive messages, therefore, is not significant, and certainly does

not mean that the owner could not prevent an intentionally disruptive message. Rather, if a property owner can prohibit disruptive methods of communicating messages, there is no logical reason why the property owner could not also prohibit intentionally disruptive messages consistent with the applicable standard for assuring that the communications did not disrupt normal business operations.

Thus, a regulation by a nonpublic forum shopping center which prohibits a speaker from attempting to interfere with the function of the shopping center by urging consumers not to buy the products or services of a store in the center is allowed under California law. Once having gained access via California law, the speaker is not entitled to then ignore California law by violating a regulation permitted by the very law which placed the speaker on the private property in the first instance. Fashion Valley had every right under California law to maintain and enforce the prohibitions in Rule 5.6.2.

3. Rule 5.6.2 Is A "Content Neutral" Regulation To Protect The Shopping Center's Substantial Interest Under California Law.

When *Waremart Foods* forced the Board to apply California constitutional law, the Board decided that Rule 5.6.2 was an unconstitutional "content-based" regulation of speech. The Board's decision relies exclusively on its decision in *Glendale Assocs, Ltd.*, 335 N.L.R.B. 27 (2001), which was enforced in *Glendale Assocs, Ltd. v. NLRB*, 347 F.3d 1145 (2003) — "The pertinent principles are set

forth in *Glendale Associates*, 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003." *J.A. at 496 (tab 35).* To simplify the references to the Board and the Ninth Circuit Court of Appeals decisions, the term "*Glendale Associates* (NLRB)" refers to the Board's decision and the term "*Glendale Associates* (9th Cir)" refers to the Ninth Circuit Court of Appeals decision.

Glendale Associates (9th Cir) cites *Alliance for Survival*, 22 Cal.4th 352, for the statement that, under the California constitution, the Court "must first determine whether the rule is content-neutral or content-based." *Id.*, 347 F.3d at 1155. However, neither *Glendale Associates* (NLRB) nor *Glendale Associates* (9th Cir) offer any reason for not using the definition of a content-neutral regulation articulated by the California supreme court in *Alliance for Survival.* In fact, the Board provided no explanation whatsoever of why Rule 5.6.2. is a content-based regulation in its Order in this case. For the reasons explained below, Rule 5.6.2. is a constitutional content-neutral regulation of speech.

"Content-neutral" or "content-based" — why is that significant? The answer is not that content-neutral regulations are per se constitutional, or that content-based regulations are per se unconstitutional. The answer is that there is significant difference in the applicable standard. As noted by the California supreme court in *Alliance for Survival*, "[California] decisions applying the liberty of speech clause [of the California constitution], like those applying the First

Amendment, long have recognized that in order to qualify for intermediate scrutiny (i.e., time, place, and manner) review, a regulation must be "content neutral" and that if a regulation is content based, it is subject to the more stringent strict scrutiny standard. *Id.*, 22 Cal.4th at 364-365 (citations omitted).

Is a prohibition against requesting a boycott a "content-based" regulation of the Union handbill? No. For the reasons discussed below, the constitutional analysis is not simply whether one needs to read the Union handbill to answer the question. The constitutional analysis is whether the regulation is justified by legitimate concerns unrelated to any disagreement with the subject matter of the protest or the reason why a boycott would be requested.

In *Alliance for Survival*, the California supreme court set forth what is in this case an extraordinarily relevant definition of a content-neutral regulation. A content-neutral regulation is one that "... is justified without reference to the content of the regulated speech." *Id.*, 22 Cal.4th at 367. *Alliance for Survival* observed that "[the U.S. Supreme Court cases to which it looked for guidelines] do not require literal or absolute content neutrality, but instead require only that the regulation be 'justified' by legitimate concerns that are unrelated to any 'disagreement with the message' conveyed by the speech." *Id.*, at 368. *Alliance for Survival* criticized the "literal approach," such as that used here by the Board, because it fails to recognize "concerns about ... censorship are not raised by a

regulation that, responding to the problems and hazards created ..., applies to all solicitation of funds, regardless of the subject matter or viewpoint for which funds are solicited." *Id.*, at 378.

Alliance for Survival reviewed the three U.S. Supreme Court decisions on which the defendant had relied for guidance in formulating its definition of a content-neutral regulation. One of those decisions was *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The subject zoning ordinance in *Renton* restricted the locations of adult theaters. Even though the ordinance discriminated on its face against certain forms of speech based on content, the ordinance was constitutionally "content-neutral" because the ordinance was aimed, not at the content of the film shown in adult theaters, but on the secondary effects of the theaters on the surrounding community. *Alliance for Survival*, 22 Cal.4th at 368.

Alliance for Survival also reviewed *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The regulation in *Heffron* did not restrict the communication of the speaker's views. The regulation only restricted requests for funds, and restricted such requests without regard to the speaker's views. The U.S. Supreme Court "with little analysis" held that distinction between solicitation and the communication of the speaker's views constitutionally "content-neutral." *Alliance for Survival*, 22 Cal.4th at 368-369.

Alliance for Survival also reviewed *United States v. Kokinda*, 497 U.S. 720 (1990). In *Kokinda*, the U.S. Postal Service prohibited solicitation on a walkway between the parking lot and the post office. *Kokinda*, in deciding that this prohibition was constitutionally "content-neutral," noted that solicitation was "inherently" "disruptive of business." The prohibition was constitutionally "content-neutral" because the regulation took aim at the "inherent nature of solicitation," and did "not discriminate on the basis of the content of viewpoint." *Alliance for Survival*, 22 Cal.4th at 369-370.

The detailed review by *Alliance for Survival* of Justice Kennedy's concurring opinion in *Kokinda* is extraordinarily relevant to Fashion Valley's prohibition of boycott requests in a "center of commerce." Justice Kennedy noted that the regulation reviewed in *Kokinda* "permits the respondents and all others to engage in political speech on topics of their choice." Justice Kennedy observed that "Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions." Justice Kennedy approved the regulation because it was "... narrow in its purpose, design, and effect, does not discriminate on the basis of content or viewpoint, is narrowly drawn to serve an important governmental interest, and permits respondents to engage in a broad range of activity to express their view..." *Alliance for Survival*, 22 Cal.4th at 369-370.

Alliance for Survival also reviewed *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). *Alliance for Survival* turned for a second time to a concurring opinion by Justice Kennedy to explain the difference between content-neutral and content based regulations, noting that in *Lee* Justice Kenney distinguished between speech that is a mere expression of ideas to the listener, and speech that requires immediate physical conduct by the listener that is inherently disruptive of the purpose of which the property owner dedicated the property. *Alliance for Survival*, 22 Cal.4th at 371-372.

Fashion Valley has a legitimate concern, wholly unrelated to the protested condition or the reason why the boycott is being requested, for its prohibition of appeals made to consumers not to purchase goods from the stores in the mall — freedom from interference with the sales of merchandise and services in the shopping center. The boycott prohibition responds to a hazard created by the shopping center customers' not purchasing merchandise or services from one or more stores in the shopping center, without disrupting the protestors' ability to discuss and debate the content of the protest or the protestor's viewpoint. A boycott requests physical conduct that is inherently disruptive of the use of the shopping center as a "center of commerce" because it necessarily interferes with the sales of merchandise and services in the shopping center.

Alliance for Survival eliminates any ground for finding that the boycott prohibition in Rule 5.6.2 was unconstitutional simply because it regulated protected activities. "The circumstance that an ordinance regulates protected conduct does not in itself, however, render the ordinance invalid under the liberty of speech clause. *Alliance for Survival*, 22 Cal.4th at 364.

Fashion Valley submits that, when measured by the *Alliance for Survival* definition of a "content-neutral" regulation, Rule 5.6.2 is clearly a content-neutral regulation. Replacing the regulating aspect of the speech in *Alliance for Survival*, solicitation of funds, with the regulated aspect of speech in Rule 5.6.2, the *Alliance for Survival* holding would read that concerns about censorship are not raised by a regulation that prohibits all boycott appeals directed at the Mall's stores or any of the goods or services sold by Mall merchants, regardless of the subject matter of the protest or the protestor's point of viewpoint.

The "Dear Customer" handbill the Union distributed at Fashion Valley presents an excellent example of why Rule 5.6.2 uses a constitutionally appropriate manner of protecting the shopping center's substantial or compelling interests. The "Dear Customer" handbill:

1. Criticized the labor policies and practices of the local newspaper, the San Diego Union Tribune, and asked anyone reading the handbill to call the Union Tribune's CEO.

2. Underscored the fact that the Union's dispute was with the Union Tribune, and that the Union was not asking any employees to stop working.

3. Informed anyone reading the handbill that Robinsons-May advertised in the Union Tribune.

Thus, the Union handbill criticized the labor policies and practices of the Union Tribune. That is acceptable under Rule 5.6.2 because Rule 5.6.2 did not apply to the Union-Tribune or any other business that did not have a store in the shopping center; the Rule only sought to prevent interference with the business of stores in the shopping center.

The Union handbill asked that recipients call the Union-Tribune's CEO. Once again, that is acceptable under Rule 5.6.2 because the Rule is "narrowly tailored" to prevent interference with a business in the shopping center. Moreover, even if the Union handbill had asked the shopping center's customers to call the CEO of Robinsons-May, that would have been acceptable under the Rule, because the Rule is narrowly tailored to only prevent boycott requests.

The Union handbill identified the store by name. That is acceptable because Rule 5.6.2, unlike the *Glendale Associates* rule, did not include the tenant name prohibition that the Ninth Circuit Court and the Board found unlawful under the California constitution. This, of course, gives the protestors a forum to effectively criticize the products and services sold in the shopping center and the stores in the

shopping center, and the interested customers an opportunity to educate themselves.

A content-neutral regulation is enforceable if it survives the "intermediate scrutiny" of time, place, and manner analysis. *Alliance for Survival*, 22 Cal.4th at 364. A content-neutral regulation of constitutionally protected activities will be upheld as a reasonable time, place, and manner regulation so long as it is (i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication." *Id.*, citing *Savage v. Trammell Crow Co.*, 223 Cal.App.3d 1562, 1572-1574 (1990).

Applying this three-step analysis to Rule 5.6.2:

1. Narrowly Tailored — As discussed above, the Rule is store and shopping center specific, sales specific, conduct specific. The Rule prohibits objective conduct (i.e., statements or writings). The Rule only prohibits requests for physical action (or more specifically inaction) that is inherently incompatible with the promotion of the sales of merchandise and services in the shopping center. The Rule provides a forum for the discussion and debate of the protested condition and the protestor's point of view. The Rule only prevents express requests that customers not do what the shopping center was created to promote — the sales of merchandise of services by the stores in the shopping center.

2. Significant Interest — *H-CHH Associates*, *Savage*, and *UNITE* have laid to rest any doubt that Fashion Valley has a significant and compelling interest in freedom from disruption of the sale of merchandise and services in the shopping center.

3. Alternative Avenues of Communication — The protestors are free to communicate and discuss their respective points of view about the protested condition on the shopping center premises, and are free to request a boycott on the public sidewalks around the perimeter of the shopping center.

Alliance for Survival does not discuss the "public forum doctrine" in determining what is an appropriate definition of a content-neutral regulation. There appear to be two explanations for the absence of any reference in *Alliance for Survival* to *Clark*. The first is that *Alliance for Survival* was reviewing a city ordinance applying to activities on property requiring the most stringent standard of review, "traditional public forums" such as public streets and parks. The second is that *Clark* had reviewed the extent to the property owner may use content-based regulations, and *Alliance for Survival* was defining what was not a "content-based" regulation.

Alliance for Survival and *Clark*, although approaching the relevant issue through an analysis of different issues, reach essentially the same conclusion. A privately owned shopping center can prohibit a potentially disruptive aspect of

protest or other expressive activity as long as the regulation is "viewpoint-neutral," meaning that the prohibition applies without regard for subject matter of the expressive activity or the viewpoint of the Applicant or Participants.

The Board's ruling ignores the difference between shielding the stores in the shopping center from debate and discussion about a protested condition, etc., regardless of the purpose, and shielding the stores from requests that customers do something (or more precisely, not do something) that the shopping center was developed and is operated to promote. According to both *Alliance for Survival* and *Clark*, a shopping center has a right to shield the stores from a protestor's requests that customers do something which is necessarily incompatible with the shopping center's promotion of the sales of merchandise and services in the shopping center (i.e., not purchase merchandise and services in the shopping center) as long as the protestors are able to discuss and debate the subject matter of their protest and their point of view. Rule 5.6.2 allows, without exception, discussion and debate about the substantive issues. It only prohibits requesting that customers not do what they were presumably at the shopping center to do — buy something.

Like a request for funds to support the advancement of the speaker's cause, a request for a boycott is a request by the speaker that the customer do something to advance the speaker's cause. And, like a solicitation of funds, a boycott request is a request that customers, who the stores, owners, and/or managers have succeeded

in attracting to the shopping center, do something that is incompatible with the promotion of the stores in the shopping center. For solicitations, it is getting money that could be used to purchase merchandise or services, and for boycotts it is not to do what the shopping center was developed and promoted to do — sell merchandise and services.

Alliance for Survival, therefore, is an excellent preview of what the California supreme court would do with a shopping center's prohibition of boycott requests that still allowed discussion and debate of the substantive issues. In fact, a request for a boycott is significantly more incompatible with the promotion of sales of merchandise and services than a solicitation for money. For sure, a successful solicitation takes some of the customer's financial resources, but it does not necessarily drain those resources to the point where it keeps the customer from purchasing anything. In contrast, a boycott, in addition to competing for the loyalty of the customer, necessarily keeps the customer from purchasing merchandise or services, and that keeps the store from making the sale needed to pay the rent owed the owner of the shopping center.

In this regard, the successful solicitation is more like discussion critical of a stores products, policies, etc. Both a successful solicitation and a critical discussion create a risk of the loss of a sale. In contrast, a boycott necessarily creates the loss of a sale. In all other respects, the solicitation of funds and a

boycott request are identical. Rather than involving a discussion and debate of the speaker's viewpoint, they are requests that a customer take immediate action for the speaker's benefit. Therefore, there is no logical reason to expect the California supreme court to see a boycott request in a different light that it has seen the solicitation of funds. If the prohibition is viewpoint neutral, and permits discussion and debate of the speaker's viewpoint, boycotts can be prohibited for the same reason that the solicitation of funds can be prohibited.

The Fashion Valley Rule makes no effort to promote the sales of merchandise and services by preventing criticism of protested product, conditions, policy, etc., or discussion and debate of that criticism. The Board's ruling implicitly, if not explicitly, recognizes this fact. The Board is not challenging the language used to prevent boycott requests. The Board is not seeking to prevent the use of Fashion Valley Rule 5.6.2 because it could be read as prohibiting discussion and debate. Rather, the Board wishes to prevent the use of the Rule because it prohibits boycott requests. Emphasizing the defect it sees in the Fashion Valley Rule, the Board's order also prevents the use of any other rule that prohibits boycott requests.

In conclusion, the Fashion Valley Rule provides a forum for the communication and discussion of information without regard to what the listener/reader may decide to do with this information, or what the speaker/writer

wanted the members of his/her audience to do with this information. The Fashion Valley Rule only prohibits requests that customers not do what they are likely to be on their way to do — purchase the targeted stores merchandise or services.

Thus, it is clear that proper analysis of Rule 5.6.2 under California law requires the conclusion that the Rule is entirely permissible under California law. The Rule is applicable to a nonpublic form, and therefore is allowed as a reasonable means to reserve the Mall for its intended purposes. The Rule is narrowly tailored to avoid interference with the primary purpose of the Mall, the sale of goods and services by the Mall's merchants to the shopping public. The Rule is justified by legitimate concerns unrelated to any disagreement with the subject matter of the protest or the reason why a boycott is to be requested, and is therefore "content neutral" under California law. The Board below failed to analyze the Rule under California law. Instead, it simply labeled the Rule "content-based" and therefore unlawful. However, the Rule is neither. The Board erred in finding that Rule 5.6.2 was unlawful under California law, and its Order therefore must be set aside.

C. California Law Allowed Fashion Valley To Require The Union To Apply For A Permit To Distribute Its "Dear Customer" Handbill, And The Union Would Have Received A Permit Allowing The Distribution Of The Handbill Had It Made A Proper Application

The Board held that the Union was not required to apply for a permit to distribute its "Dear Customer" handbill because the Union would have been

required to adhere to "an unlawful rule" [Rule 5.6.2] as part of the application process. *J.A. at 496 (tab 35).* The Board's holding is apparently based on the Board's adoption of the ALJ's finding that the "Dear Customer" handbill requested a consumer boycott, and that the Union therefore would not have received a permit to distribute the leaflet had it applied for one. *J.A. at 501, 505-506 (tab 35).* The "substantial evidence" standard of review should be applied to these findings. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

The Board's apparent conclusion that Rule 5.6.2 as it existed in October 1998 would have prevented the Union from receiving a permit to distribute its leaflet is contrary to all relevant evidence in the record. Rule 5.6.2 prohibited any person engaging in expressive activities at Fashion Valley from "urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center" (J. A. at 183 (tab 4). The Union's handbill did not, on its face or as interpreted by Respondent, violate Rule 5.6.2 because it does not request a consumer boycott of Robinsons-May.

The language of the handbill, which is clear and unambiguous, first states a number of grievances that the Union has against the Union Tribune. It then advises the recipients "how you can help" the Union in its labor dispute: "Call Gene Bell, CEO at the Union Tribune, 293-1101." While the handbill

subsequently advises that Robinsons-May advertises with the Union Tribune, the handbill does not request the recipients thereof to refuse to shop at Robinsons-May because it does. Thus, the language of the handbill on its face does no more than serve to advise the public of the nature of the Union's labor dispute with the Union Tribune. While Fashion Valley readily agrees that the content of the handbill is therefore subject to protection under Section 7 of the Act, this does not mean that the handbill constitutes a request for a consumer boycott of Robinsons-May. As such, the handbill does not fall within the prohibition of Rule 5.6.2.

Moreover, Fashion Valley's representative who would have been charged with the responsibility to determine whether the handbill violated Rule 5.6.2 had the Union submitted an application to distribute it, testified at the hearing that the handbill did **not** violate the Rule.

> Q. Now, you have viewed what has been introduced into evidence as General Counsel's Exhibit 3, a leaflet that was distributed by the Charging Party in this case?
>
> A. I have and I should indicate that the first time I ever saw a copy of it was within the last couple of days.
>
> Q. And in your review of this document, do you see anything in this document that would create issues relating to those provisions of the Rules of the shopping center which is set forth in Subsection 526.2 [sic]?
>
> A. No. It's an effort to explain a position on a labor issue concerning a business that is not in our shopping center. And it appears to be just a general effort to take advantage of the fact that large numbers of members of the public are there and they want to communicate with

> them, and that is what Pruneyard said everybody has a right to do.

J.A. at 103 (tab 1).

In light of what the handbill actually says and the testimony quoted above, the Board's apparent "interpretation" of the intent of the handbill is not supported by the evidence in the record. The Board's interpretation certainly cannot be relied upon to support its determination that the Union was privileged to completely ignore Fashion Valley's lawful application-permit process, or that Fashion Valley committed an unfair labor practice under the Act when it challenged the Union's right to take access to Fashion Valley, at any time and for any purpose, simply because Rule 5.6.2 was included in Fashion Valley's Rules. The Board's critical factual determinations in this regard are unsupported by substantial evidence on the record as a whole. Accordingly, the Board's Order must be set aside and its petition for enforcement denied.

VII.

CONCLUSION

The Board failed to analyze Fashion Valley's Rule 5.6.2 under applicable California law. As explained above, that analysis confirms that Rule 5.6.2 was entirely proper under California law. Moreover, the Board's conclusion that the Union's handbill violated Rule 5.6.2 is not supported by substantial evidence in the record considered as a whole. Fashion Valley committed no violation of the National Labor Relations Act and this Court should deny enforcement of the Board's Order.

DATED: June 17, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

I, THEODORE R. SCOTT, do hereby certify that this brief complies with Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief utilizes a 14-point proportionally spaced face for text. The brief contains 13708 words according to the word count of the word-processing system used to prepare the brief.

Dated: June 17, 2005 Respectfully submitted,

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CERTIFICATE OF SERVICE

Fashion Valley Mall, LLC v. National Labor Relations Board

Case Nos. 04-1411, 05-1027, 05-2039

I, Yvonne Kametani, declare as follows:

I am employed with the law firm of Luce, Forward, Hamilton & Scripps LLP, whose address is Del Mar Gateway, 11988 El Camino Real, Suite 200, San Diego, California 92130-2594. I am over the age of eighteen years, and am not a party to this action.

On July 22, 2005, I caused to be served 2 copies of the following:

[CORRECTED] BRIEF FOR PETITIONER FASHION VALLEY MALL, LLC

on the interested parties in this action by:

X **U. S. MAIL:** I placed the copies in a separate envelope, with postage fully prepaid, for each address named below for collection and mailing on the below indicated day following the ordinary business practices at Luce, Forward, Hamilton & Scripps LLP. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.

_____ **OVERNIGHT MAIL:** I sent a copy via

_____ **OVERNIGHT COURIER SERVICE:** I placed a copy in a separate envelope addressed to each addressee as indicated below, and caused such envelope(s) to be delivered via _____.

_____ **HAND DELIVERY:** I placed a copy in a separate envelope addressed to each addressee as indicated below, and delivered it to _____ for personal service.

_____ **FACSIMILE:** I sent a copy via facsimile transmission to the telefax number(s) indicated below. The facsimile machine I used complied with California Rules of Court, Rule 2003 and no error was reported by machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

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_____ **(STATE):** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_X_ **(FEDERAL):** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed at San Diego, CA on July 22, 2005.

Yvonne Kametani

Yvonne Kametani

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